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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO DIVISION)

FINJAN LLC,

Plaintiff,

v.

PALO ALTO NETWORKS, INC.,

Defendant.

Case No. 3:14-cv-04908-RS

**FINJAN LLC'S REPLY IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT OF NO INVALIDITY**

Date: November 14, 2024
Time: 1:30 P.M.
Hon. Richard Seeborg
Ctrm. 3, 17th Floor

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1 **I. INTRODUCTION**

2 PAN's opposition not only confirms that PAN cannot put forth any admissible evidence
 3 demonstrating the public availability of its alleged system references, but also underlines the
 4 obfuscation PAN has employed throughout this case. Finjan's motion described the absence of
 5 admissible evidence put forth on public availability and emphasized the unfair prejudice of PAN
 6 attempting to rely on untimely hearsay evidence. PAN produced declarations from Trend Micro
 7 and Check Point employees on the final day of fact discovery despite being aware of the relevant
 8 systems for years. Now, to further compound the prejudice, PAN attaches two never-before-seen
 9 declarations purportedly supporting the public availability of the alleged VICEd and Privoxy
 10 systems. Further, for the first time, PAN suggests that it will rely on its technical expert to provide
 11 factual testimony regarding the availability of the alleged Janus system after failing to disclose
 12 such reliance during fact discovery. But PAN should not be rewarded for its discovery
 13 misconduct—it was required to disclose the admissible evidence it would rely on and failed to do
 14 so during fact discovery. Further, as explained below, PAN cannot demonstrate how any of the
 15 relied-upon evidence for each alleged system's public availability can be presented in an
 16 admissible form at trial. Therefore, as a matter of law, Finjan is entitled to summary judgment of
 17 no invalidity with respect to the Trend Micro systems (Applet Trap and Virus Wall), Check Point
 18 system (Check Point Firewall-1), VICEd system, Privoxy system, and Janus system.

19 **II. LEGAL STANDARD**

20 Federal Rule of Civil Procedure 56 requires that a “court shall grant summary judgment if
 21 the movant shows that there is no genuine dispute as to any material fact and the movant is
 22 entitled to judgment as a matter of law.” *See* Fed. R. Civ. P. 56(a). A party opposing a motion for
 23 summary judgment may cite to declarations for support. Fed. R. Civ. P. 56(c)(1), 56(c)(4).
 24 However, any declaration used to oppose a motion for summary judgment must “set out facts that
 25 would be admissible in evidence.” Fed. R. Civ. P. 56(c)(4); *see also* Fed. R. Civ. P. 56(c)(1)(B) (a
 26 party asserting that a fact cannot be genuinely disputed may “show[]... that an adverse party
 27 cannot produce admissible evidence to support the fact”). The case law is clear, including PAN's
 28 cited case, *Fraser*, that a declaration may only be used to oppose a motion for summary judgment

1 if its “contents could be presented in an admissible form at trial.” *Fraser v. Goodale*, 342 F.3d
 2 1032, 1037 (9th Cir. 2003); *see also, e.g., Safas Corp. v. Etura Premier, LLC*, 293 F.Supp.2d 442,
 3 446 (D. Del. Nov. 12, 2003) (holding that hearsay could not be considered on a motion for
 4 summary judgment because “the proponent of the evidence has not indicated... how it might
 5 overcome a hearsay objection at trial”); *Scosche Indus. v. Visor Gear Inc.*, 121 F.3d 675, 681 (Fed.
 6 Cir. 1997) (collecting cases holding that hearsay should be disregarded in a Court’s review of a
 7 summary judgment motion). PAN seems to agree on this point. *See Opp.* at 3 (agreeing that the
 8 caselaw “stand[s] for the unremarkable proposition that *hearsay statements included within a*
 9 *declaration* cannot be relied on to defeat summary judgment”) (emphasis in original).

10 PAN cites two other cases on this issue, *Fed. Deposit* and *Nigro*. *Opp.* at 1, 3. But neither
 11 suggest a different result. **First**, *Fed. Deposit* stands for the straightforward proposition, also held
 12 in *Fraser*, that at the summary judgment phase, the focus is not on “the admissibility of the
 13 evidence’s form,” but rather “the admissibility of its contents.” *Compare Fraser*, 342 F.3d at
 14 1036-37 with *Fed. Deposit Ins. Corp. v. New Hampshire Ins. Co.*, 953 F.2d 478, 485 (9th Cir.
 15 1991) (“the nonmoving party need not produce evidence ‘***in a form*** that would be admissible at
 16 trial in order to avoid summary judgment”) (emphasis added). Moreover, *Fed. Deposit* is
 17 inapposite because, there, the movant failed to object to the admission of the relevant evidence. *Id.*
 18 at 485. **Second**, *Nigro* is inapposite because (1) no hearsay objection was raised, and (2) the
 19 plaintiff’s own declaration and deposition testimony were at issue, the contents of which could be
 20 presented in an admissible form since the declarant was a party available to testify at trial. *Nigro v.*
 21 *Sears, Roebuck and Co.*, 784 F.3d 495, 498 (9th Cir. 2015).

22 For evidence to be admissible, it must satisfy the Federal Rules of Evidence, which include
 23 rules of authenticity (*e.g.*, Fed. R. Evid. 901) and the rules against hearsay (Fed. R. Evid. 801-
 24 807). Hearsay is “a statement that (1) the declarant does not make while testifying at the current
 25 trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the
 26 statement.” Fed. R. Evid. 801(c). Meanwhile, to authenticate evidence, “the proponent must
 27 produce evidence sufficient to support a finding that the item is what the proponent claims it is.”
 28 Fed. R. Evid. 901(a). These are independent rules, and evidence must be both authentic and not

1 hearsay (or subject to an exception to the rules against hearsay), in order to be admissible. *See*,
2 *e.g.*, *Orr v. Bank of Am.*, 285 F.3d 764, 778-779 (9th Cir. 2002) (holding that authenticated
3 exhibits were nevertheless hearsay and therefore inadmissible).

4 **III. ARGUMENT**

5 **A. Trend Micro and Check Point Systems**

6 PAN presents no non-hearsay evidence regarding the public availability of the alleged
7 Trend Micro and Check Point systems, and so a finding of summary judgment of no invalidity is
8 warranted with respect to the Applet Trap, Virus Wall, and Check Point Firewall-1 systems.

9 To support its contention that the alleged Trend Micro and Check Point systems were
10 available before the filing dates for the Asserted Patents, PAN points to (1) a declaration from
11 John Chen, a Trend Micro employee (“Chen Declaration”), (2) a declaration from Tamir Zegman,
12 a Check Point employee (“Zegman Declaration”), and (3) source code and technical documents
13 produced by third-parties Trend Micro and Check Point. *Opp.* at 2-4. This evidence is
14 inadmissible hearsay, in that they each comprise out-of-court statements offered for the truth of
15 the matter asserted (*i.e.*, the date of public availability of the alleged Trend Micro and Check Point
16 systems). *See* Fed. R. Evid. 801(c). Further, none of this evidence can defeat summary judgment,
17 as explained below.

18 With respect to the Chen and Zegman declarations, PAN’s process of disclosure was a
19 ploy to deprive Finjan of discovery on the veracity of the hearsay statements and should not be
20 considered in opposing summary judgment. Despite knowing that it would disclose declarations
21 from Messrs. Chen and Zegman, PAN failed to disclose that it intended to rely on those
22 individuals for any relevant fact in this case. Instead, PAN worked to secure those declarations
23 without disclosing that fact to Finjan until producing those declarations on the last day of
24 discovery when it was too late to seek discovery. This litigation-by-ambush tactic cannot defeat
25 summary judgment.

26 Further, neither the Chen Declaration nor the Zegman Declaration can defeat summary
27 judgment because PAN has not shown that the hearsay statements in either declaration will be
28 presented in an admissible form at trial. *See, e.g., Fraser*, 342 F.3d at 1037; *Scosche*, 121 F.3d at

681; *Safas*, 293 F.Supp.2d at 446. For example, PAN does not make any representation that Messrs. Chen or Zegman will be testifying at trial regarding the public availability of the alleged Trend Micro and Check Points systems, respectively, and instead suggests that “Messrs. Chen and Zegman set forth admissible facts of which they have personal knowledge and *could testify to at trial*.” *See* Opp. at 3 (emphasis added). Even if PAN did intend to serve Mr. Zegman with a trial subpoena, his testimony could not be compelled under Fed. R. Civ. P. 45(c)(1), as he is located across the world in Tel Aviv, Israel, more than 100 miles from this Court. *See* Opp., Ex. 3 at 3. In addition, even if PAN did intend to serve trial subpoenas on Messrs. Chen and Zegman, and they planned to testify, PAN should be precluded from relying on such testimony for the reasons explained in Finjan’s motion. *See* Mot. at 7-8. Further, PAN would be violating the parties’ agreement (*see* Opp., Ex 13) because (1) PAN did not identify Messrs. Chen and Zegman in its initial disclosures,¹ (2) Finjan did not have the opportunity to depose them during fact discovery, and (3) PAN has not shown good cause for producing their declarations on the last day of fact discovery. Opp., Ex. 6 at 8; Opp., Ex. 13.

PAN’s reliance on its November 28, 2022 correspondence with Finjan, a month before the close of fact discovery, only highlights the impropriety of PAN’s late-produced declarations. Opp. at 4. In the parties’ correspondence, PAN represented that it was seeking a “stipulation allowing for all documents and source code produced by Trend Micro *to be authenticated by declaration in lieu of a deposition*.” Opp., Ex. 12 at 3 (emphasis added). It was not until the last day of fact discovery, that PAN surprised Finjan with the Chen and Zegman Declarations, filled with statements directed to public availability and hearsay exceptions. *See generally* Opp., Exs. 2, 3. Without testimony from Messrs. Chen or Zegman at trial, the statements in their declarations remain hearsay that cannot be presented in an admissible form at trial, and therefore should be

¹ In its initial disclosures, PAN only identifies “Trend Micro, Inc.” and “Check Point Software Technologies, Ltd.” generally. Opp., Ex. 6 at 8. Further, PAN only designated each third-party as testifying regarding the “[d]esign, structure, and operation of” the alleged Trend Micro and Check Point systems, respectively. *Id.* at 8. PAN provided no disclosure that any testimony would be provided by Trend Micro or Check Point regarding the public availability of these systems. *Id.* at 8.

1 disregarded. *See, e.g., Fraser*, 342 F.3d at 1037; *Scosche*, 121 F.3d at 681; *Safas*, 293 F.Supp.2d at
2 446.

3 Beyond the Chen and Zegman Declarations, PAN also relies on dates referenced in Trend
4 Micro and Check Point documents. But such evidence is also inadmissible hearsay, and so it
5 cannot preclude a finding of summary judgment with respect to these references. *See* Mot. at 6-7
6 (citing cases holding that uncorroborated dates printed on documents cannot preclude summary
7 judgment of no public availability).

8 Because PAN has presented no admissible evidence supporting the public availability of
9 the alleged Trend Micro and Check Point systems, which it must prove by clear and convincing
10 evidence, Finjan is entitled to summary judgment of no invalidity with respect to these references.

11 **B. VICEd**

12 PAN presents no non-hearsay evidence regarding the public availability of the alleged
13 VICEd system, and so a finding of summary judgment of no invalidity is warranted with respect to
14 this reference.

15 To support its claim of the alleged VICEd system's public availability, PAN only points to
16 (1) a declaration from Rachel J. Watters, a librarian at the Madison Wisconsin Memorial Library,
17 which PAN has just now produced nearly two years after the close of fact discovery, and (2) the
18 printed date on the VICEd guide. Opp. at 4-5. Both are hearsay, in that they are out-of-court
19 statements offered for the truth of the matter asserted (*i.e.*, the date of public availability of the
20 alleged VICEd system). *See* Fed. R. Evid. 801(c).

21 PAN should be precluded from relying on Ms. Watters' testimony because PAN did not
22 identify Ms. Watters in its initial disclosures. Opp., Ex. 6 at 3-9. Further, PAN has not shown good
23 cause for its late disclosure of Ms. Watters, and therefore must be precluded from calling her as a
24 witness, pursuant to the parties' agreement. Opp., Ex. 13. PAN has been aware of the alleged
25 VICEd system since at least May 2021, when it served its initial invalidity contentions. *See, e.g.*,
26 Opp., Ex. 16 at 10. Also, PAN was able to identify a potential witness and collect a declaration
27 purportedly supporting the alleged VICEd system's public availability only one week after Finjan
28 filed the instant motion. *See* Opp. Ex. 14 at 3 (declaration dated September 18, 2024). It certainly

1 could have done so during fact discovery; PAN cannot justify this grossly late disclosure almost
 2 two years later, and does not attempt to do so. Opp. at 4-5. Without Ms. Watters testifying at trial,
 3 the statements in her declaration are hearsay that PAN cannot show can be presented in an
 4 admissible form at trial, and therefore cannot preclude summary judgment. *See, e.g., Fraser*, 342
 5 F.3d at 1037; *Scosche*, 121 F.3d at 681; *Safas*, 293 F.Supp.2d at 446.

6 Moreover, PAN does not make any representation that Ms. Watters will be testifying at
 7 trial regarding the public availability of the alleged VICEd system, and her declaration also gives
 8 no indication that she plans to testify. *See* Opp. at 5; Opp., Ex. 14 at 1-3. Even if PAN did intend
 9 to serve Ms. Watters with a trial subpoena, Ms. Watters could not be compelled to testify under
 10 Fed. R. Civ. P. 45(c)(1), as she is located in Madison, Wisconsin, more than 100 miles from this
 11 Court. *See* Opp., Ex. 14 at 3.

12 Aside from Ms. Watters' declaration, the only other evidence relied upon by PAN is the
 13 date printed on the VICEd Guide, which is uncorroborated hearsay that cannot preclude summary
 14 judgment of no invalidity. *See* Mot. at 6-7 (citing cases holding that uncorroborated dates printed
 15 on documents cannot preclude summary judgment of no public availability). This is especially
 16 true here, as PAN has not shown how the VICEd Guide can be presented in an admissible form at
 17 trial. *See, e.g., Fraser*, 342 F.3d at 1037; *Scosche*, 121 F.3d at 681; *Safas*, 293 F.Supp.2d at 446.

18 Even if PAN were to rely on the VICEd reference as a printed publication, rather than a
 19 prior art system, the same deficiency in proof applies.² Opp. at 5; *In re Hall*, 781 F.2d 897, 898-
 20 899 (Fed. Cir. 1986) ("Because there are many ways in which a reference may be disseminated to
 21 the interested public, 'public accessibility' has been called the touchstone in determining whether
 22 a reference constitutes a 'printed publication' bar under 35 U.S.C. § 102(b)."). To the extent PAN
 23 cites *Ciampi* for the proposition that printed publications are somehow immune to the rule against
 24 hearsay, this is incorrect. In *Ciampi*, the Court found that a number of newspaper articles in
 25 support of a defamation claim were not hearsay, as they were only being offered as evidence that
 26 the allegedly defamatory statements were published. *Ciampi v. City of Palo Alto*, 790 F.Supp.2d
 27

28 ² Beyond PAN's failure to overcome the rule against hearsay, PAN also presents no
 admissible evidence authenticating the VICEd Guide. For example, the reference does not qualify
 as self-authenticating evidence under Fed. R. Evid. 902.

1 1077, 1091 (N.D. Cal. May 11, 2011). In other words, the plaintiff was not relying on the admitted
 2 articles to prove that the articles were published by a certain date, or that any statement within the
 3 newspaper articles was in fact true, but only that the statements were made to the public at some
 4 point. *Id.* at 1091. By contrast, here, PAN is attempting to rely on the date printed on the VICEd
 5 Guide as evidence that the reference was in fact published by that date (*i.e.*, relying on the truth of
 6 the matter asserted). Opp. at 4-5.

7 Because PAN has presented no admissible evidence supporting the public availability of
 8 the alleged VICEd system, or the VICEd Guide, which it must prove by clear and convincing
 9 evidence, Finjan is entitled to summary judgment of no invalidity with respect to the VICEd
 10 reference.

11 **C. Privoxy**

12 PAN presents no non-hearsay evidence regarding the public availability of the alleged
 13 Privoxy system, and so a finding of summary judgment of no invalidity is warranted with respect
 14 to this reference as well.

15 To support its claim of the alleged Privoxy system's public availability, PAN points to (1)
 16 a declaration from Christopher Butler, an employee of the Internet Archive, which, like the
 17 declaration of Ms. Watters, PAN has just now produced nearly two years after the close of fact
 18 discovery, (2) revision dates in the source code, and (3) metadata for the source code. Opp. at 5-6
 19 (citing Exs. 17-19, 21, 27). Each is inadmissible hearsay, in that each of the revision dates,
 20 metadata, and declaration are out-of-court statements offered for the truth of the matter asserted
 21 (*i.e.*, the date of public availability of the alleged Privoxy system). *See* Fed. R. Evid. 801(c).

22 PAN should be precluded from relying on Mr. Butler's testimony because PAN did not
 23 identify Mr. Butler in its initial disclosures. Opp., Ex. 6 at 3-9. Further, PAN has not shown good
 24 cause for its late disclosure of Mr. Butler, and therefore must be precluded from calling him as a
 25 witness, pursuant to the parties' agreement. Opp., Ex. 13. PAN has been aware of the alleged
 26 Privoxy system since at least May 2021, when it served its initial invalidity contentions. Ex. 11
 27 (May 17, 2021, PAN's Initial Invalidity Contentions) at 95. Also, PAN was able to identify a
 28 potential witness and collect a declaration purportedly supporting the alleged Privoxy system's

1 public availability only 13 days after Finjan filed the instant motion. *See* Opp., Ex. 21 at 2
 2 (declaration dated September 24, 2024). It certainly could have done the same in a timely manner
 3 during fact discovery, and PAN makes no attempt to show good cause for this late disclosure.
 4 Opp. at 5-7. The statements in Mr. Butler’s declaration are hearsay that PAN cannot show can be
 5 presented in an admissible form at trial, as Mr. Butler will not be testifying at trial, and therefore
 6 cannot preclude summary judgment. *See, e.g., Fraser*, 342 F.3d at 1037; *Scosche*, 121 F.3d at 681;
 7 *Safas*, 293 F.Supp.2d at 446. Further, as with the other declarants, PAN does not make any
 8 representation that Mr. Butler will be testifying at trial regarding the public availability of the
 9 alleged Privoxy system, and his declaration also gives no indication that he plans to testify. *See*
 10 Opp. at 6, n.4; Opp., Ex. 21 at 1-2.

11 Aside from Mr. Butler’s declaration, the only other evidence PAN relies upon for the
 12 public availability of the Privoxy system are revision dates and metadata from the source code.
 13 Opp. at 6. PAN suggests this code is admissible evidence under the residual hearsay exception, but
 14 PAN’s arguments should be rejected as misapplying the law for at least two reasons. **First**, the
 15 residual hearsay exception (Fed. R. Evid. 807) is only “to be used rarely and in exceptional
 16 circumstances,” which are not present here. *See Fong v. Am. Airlines, Inc.*, 626 F.2d 759, 763 (9th
 17 Cir. 1980); *see also United Tech. Corp. v. Mazer*, 556 F.3d 1260, 1279 (11th Cir. 2009)
 18 (“Congress intended the residual hearsay exception to be used very rarely, and only in exceptional
 19 circumstances”) (quoting *U.S. v. Ingram*, 501 F.3d 963, 967 (8th Cir. 2007)). **Second**, the residual
 20 hearsay exception requires that the evidence being offered “is more probative *on the point for*
 21 *which it is offered* than any other evidence that the proponent can obtain through reasonable
 22 efforts.” Fed. R. Evid. 807(a)(2) (emphasis added). Though PAN argues that the “Privoxy source
 23 code is the most probative source for how the Privoxy system operates,” this is beside the point.
 24 Opp. at 6. In this instance, PAN is offering the Privoxy source code as evidence of its public
 25 availability, not of its operation. For the same reason, PAN’s relied-upon *Lone-Star* case is
 26 inapposite,³ which involved admitting source code to prove the technical operation of a system,
 27

28 ³ PAN’s cited *Utherverse* case is also inapposite, as that Court was addressing a *Daubert*
 motion that did not concern the admissibility of the source code at issue. Opp. at 6-7; *Utherverse*

rather than its availability. Opp. at 6; *Lone Star Tech. Innovations LLC v. ASUSTek Comput. Inc.*, No. 6:19-CV-00059-RWS, 2021 WL 12137506, at *2 (E.D. Tex. May 14, 2021) (discussing whether source code should be admitted that “is offered as evidence of a material fact—ASUS’s alleged infringement”). PAN does not argue, and cannot establish, that the Privoxy source code is more probative on the issue of the alleged system’s public availability than any other evidence PAN can obtain through reasonable efforts. Fed. R. Evid. 807(a)(2). Any contention otherwise is belied by the fact that PAN never even attempted to collect Mr. Butler’s declaration during fact discovery, and yet was able to do so less than two weeks after Finjan filed the instant motion. *See* Opp., Ex. 21. Therefore, the Privoxy source code, and its metadata, cannot be admitted under the residual hearsay exception for the purpose of establishing the system’s public availability.

Because PAN has presented no admissible evidence supporting the public availability of the alleged Privoxy system, which it must prove by clear and convincing evidence, Finjan is entitled to summary judgment of no invalidity with respect to the Privoxy reference.

D. Janus

PAN’s alleged support for the public availability of the alleged Janus system is legally insufficient, and so a finding of summary judgment of no invalidity is warranted with respect to this reference as well. To support its claim of the alleged Janus system’s public availability, PAN only points to (1) a European patent publication referencing the Janus Manuscript, and (2) testimony from its own technical expert, Dr. Rubin.⁴ Opp. at 7-8 (citing Exs. 22, 24). But as explained below, neither shows that the Janus System was publicly available before June 22, 2005, the filing date for the ’633 Patent. *See* Opp. at 7.

PAN relies on European patent application publication no. EP1632833A2 for evidence of public availability, because it references the Janus Manuscript. *See* Opp. at 7 (citing Opp., Ex. 24

Gaming, LLC v. Epic Games, Inc., No. 2:21-cv-799-RSM-TLF, 2023 WL 9231334, at *4-5 (W.D. Wash. Dec. 26, 2023).

⁴ PAN also cites a recently executed, self-serving declaration from its outside counsel to purportedly authenticate the Janus Manuscript, as well as a Finjan patent and information disclosure statement from years after the filing date of the ’633 Patent. Opp. at 7 (citing Opp., Exs. 23, 25, 26). PAN fails to explain their relevance to the public availability of the alleged Janus system, but regardless, these also do not demonstrate public availability of the alleged Janus system by June 22, 2005. Opp. at 7.

at [0011]). However, this argument fails for multiple reasons. **First**, while the publication references the Janus Manuscript, it says nothing about the availability of the alleged Janus system. Opp., Ex. 24 at [0011]. **Second**, the European patent application was not published until March 8, 2006, over 8 months after the filing date of the '633 patent. Opp., Ex. 24 at Cover. Therefore, PAN's reliance on *Cornell Univ.* is inapposite. In that case, the defendant raised a genuine issue of material fact regarding the public availability of a thesis alleged to be prior art, because an "influential publication circulated to many of the researchers in the field" "cite[d] the [] thesis in such a way as to make it accessible to any reader interested in its subject matter." *Cornell Univ. v. Hewlett-Packard Co.*, No. 01-CV-1974, 2008 WL 11274580, at *5, 6 (N.D.N.Y. May 8, 2008). The Court held that the public "had and has broad access to this IEEE publication, and by extension" the alleged prior art. *Id.* at *6. The same logic does not apply here, because even assuming interested persons in the field would have seen PAN's relied-upon European patent publication, PAN cannot show such access before March 8, 2006, the date it was published. This holds true regardless of whether PAN attempts to rely upon Janus as a system or printed publication reference. *See* Opp. at 7-8.

Moreover, for the first time, PAN relies on deposition testimony provided by its technical expert, Dr. Rubin. This is also insufficient to preclude summary judgment. Despite providing no such disclosure in his reports, Dr. Rubin mentioned during his deposition that he personally knows David Wagner, the author of the Janus Manuscript, and attended a conference where David Wagner presented on the Janus Manuscript. *See* Opp., Ex. 22 at 380:25-382:19. PAN's reliance on this testimony fails for a number of reasons. **First**, Dr. Rubin makes no reference to this alleged conference, or his interactions with Dr. Wagner, in his reports. *See, e.g.*, Mot., Ex. 4, ¶¶ 69, 496. **Second**, Dr. Rubin provided no testimony regarding the date of the alleged conference. *Id.* at 380:25-382:19. **Third**, he did not testify regarding the form of Dr. Wagner's alleged presentation, including the extent to which the Janus Manuscript or alleged Janus system was described, the extent to which the Janus Manuscript was distributed to the audience, if at all, and whether any distribution was contingent on the audience members maintaining confidentiality. *Id.* at 380:25-382:19. **Fourth**, Dr. Rubin's only basis for the public availability of the Janus System is

statements allegedly made by Dr. Wagner, which is clear-cut hearsay. *Id.* at 382:16-19 (“But I remember at the time that he presented the paper, having discussions with him about various aspects of the system. And, you know, it was very clear that he had built the system.”). Dr. Rubin provides no testimony suggesting that he personally saw or used the alleged Janus system. *Id.* at 380:25-382:19. Because Dr. Wagner is not listed on PAN’s initial disclosures, and PAN has made no representation that he will be testifying, PAN cannot present this hearsay in an admissible form at trial, and so Dr. Rubin’s testimony cannot oppose a finding of summary judgment. *See, e.g., Fraser*, 342 F.3d at 1037; *Scosche*, 121 F.3d at 681; *Safas*, 293 F.Supp.2d at 446. **Fifth**, PAN has never disclosed Dr. Rubin as a fact witness, and Finjan would be unfairly prejudiced if PAN were allowed to rely on such belated factual testimony, long outside the ordered window for fact discovery. *See Opp.*, Ex. 6 at 3-9; *see also Opp.*, Ex. 22 at 382:20-23 (“Q. Sir, I’m sorry, are you an expert or are you a fact witness on the availability of prior art? A. My understanding is that I’m an expert...”). Therefore, Dr. Rubin’s testimony also cannot preclude summary judgment, regardless of whether PAN intends to rely on the alleged Janus system or the Janus Manuscript as prior art. *Opp.* at 7.

Because PAN has presented no admissible evidence supporting the public availability of the alleged Janus system or the Janus Manuscript, which it must prove by clear and convincing evidence, Finjan is entitled to summary judgment of no invalidity with respect to this reference as well.

IV. CONCLUSION

For the foregoing reasons, Finjan respectfully requests the Court grant its motion for partial summary judgment of no invalidity with respect to the alleged Trend Micro and Check Point systems, VICEd system, Privoxy system, and Janus system.

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